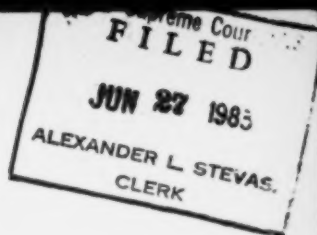


82-2111



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM. 1983

BARRY SHAPIRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HARLAN STREET, ESQUIRE
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Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the Courts below, whose factual rulings are based upon inferences completely unsupported by the record, produced a ruling so erratic as to have serious adverse effects.

2. Whether the ruling of the Eleventh Circuit Court Of Appeals which held that the actions of the Petitioner constituted an attempt to distribute marijuana, directly conflict with the rulings of the Eighth Circuit Court Of Appeals on the issue of what constitutes an attempt.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BARRY SHAPIRO,
Petitioner,
V.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Barry Shapiro petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment that court entered against him.

OPINIONS BELOW

On January 27, 1982 the District Court convicted Barry Shapiro, Petitioner, of conspiring to violate 18 U.S.C. §1952 (the "Travel Act") and attempting to violate 18 U.S.C. §841(a) (distribution of a controlled substance). (Appendix B).

The opinion of the United States Court Of Appeals, Eleventh Circuit, affirming the District Court's decision dated February 17, 1983 is reported at 699 F.2d 1164. (Appendix A).

The Order of the United States Court Of Appeals, Eleventh Circuit, dated April 27, 1983 denying Petitioner's Petition For Rehearing is printed as Appendix C.

JURISDICTIONAL STATEMENT

This Petition seeks review of a judgment of the United States Court of Appeals for the Eleventh Circuit entered on February 17, 1983 (Appendix A). On April 27, 1983 that court entered an order denying petitioner's petition for rehearing (Appendix C). The present petition was filed with this Court within sixty days of that date.

The Court of Appeals had jurisdiction under 28 U.S.C. §1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and 2101 and Rule 19(b), Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claims are based upon the provisions of the United States Constitution, governing self-incrimination and due process. U.S. Constitution, Amendment V.

STATEMENT OF THE CASE

Barry Shapiro was indicted in a two count indictment, 81-361-CR-EBD. Count I charged Petitioner with conspiring to violate Title 18, United States Code, Sections 1952 (the "Travel Act") and 2. Count II charged Petitioner with attempting to distribute a quantity of marijuana in excess of 1,000 pounds in violation of Title 21, United States Code, Sections 841 (a) (1) and 846.

On January 27, 1982 Barry Shapiro was adjudged guilty of both counts after a non-jury trial.

On April 27, 1982 Barry Shapiro was sentenced to three year's incarceration on each of the two counts, said sentences to run concurrent with each other.

Barry Shapiro appealed the judgment, conviction and sentence to the Eleventh Circuit Court of Appeals which affirmed his conviction

on February 17, 1983 and denied his Petition For Rehearing on April 27, 1983.

The Petition asks this Court to review the Court of Appeals' judgment.

FACTS

From sometime prior to June 1980 until August 4, 1981, the Federal Bureau of Investigation conducted an undercover investigation known as "Operation Bancoshares" to investigate the laundering of drug money. In Miami, Florida the FBI formed CRV, Inc. This corporation accepted cash from customers referred to it and (1) transmitted the money by wire to banks designated by the client; (2) furnished cashier's checks in exchange for currency; or (3) issued checks on the CRV account.

CRV charged a two percent commission for converting cash into a wire transfer which would subsequently be transferred to a banking institution. Of the two percent, $3/4$ of one percent went to CRV, $3/4$ of one percent went to a Mr. Elias Facuseh for referring customers and $1/2$ of one percent went to Jorge Facuseh who provided for the payment of transmitted money to the ultimate recipient.

Petitioner initially contacted CRV on July 20, 1981. He stated that he was paying an account off through Elias Facuseh. Mr. Facuseh would help the petitioner settle an account with an outstanding balance to a Mr. Jacobo de Andreis in Colombia.

On July 23, 1981 petitioner deposited \$50,000 and said that he owed Jacobo de Andreis \$800,000 and he was reducing the outstanding balance. He also stated that if everything went well \$4,000,000 would be moving soon. At that point Agent Franco asked the petitioner if the money was from marijuana. (The trial court, in its findings of fact which accompanied its judgment finding the petitioner guilty of Counts I and II of the indictment thought that the agents asked Barry Shapiro if the money was for marijuana.) Petitioner nodded. The agents then asked if he had any marijuana for sale and he replied that he had and he would get a sample.

On July 24, 1981 petitioner returned to CRV with three samples of marijuana at different prices and requested a reply to his offers by July 27.

On July 27, 1981 petitioner deposited \$50,000 to be sent to de Andreis. Petitioner was told that the buyer for the marijuana was away in Panama.

On July 28, 1981 petitioner brought \$44,510 to CRV to be sent to de Andreis. Petitioner was told that the prospective buyer of the marijuana was still in Panama.

On August 4, 1981 Operation Bancoshares terminated.

Your petitioner was indicted on August 20, 1981 and charged with conspiring to violate 18 U.S.C. §1952 (the "Travel Act") and attempting to violate 18 U.S.C. §841 (a) (distribution of a controlled substance).

PROCEEDINGS BELOW

Your Petitioner perfected his appeal to the Eleventh Circuit Court of Appeals which affirmed the judgment of the United States District Court. (Appendix A).

On April 27, 1983 the Eleventh Circuit Court of Appeals denied your Petitioner's timely petition for rehearing. (Appendix C).

REASONS FOR GRANTING REVIEW

COUNT I

Petitioner's conviction as to Count I was based upon a finding by the District Court for the Southern District of Florida that Petitioner conspired with Jacobo de Andreis to use facilities (to wit: the banking system) in foreign commerce to launder money from a marijuana distribution business.

The Circuit Court of Appeals for the Eleventh Circuit, in affirming the Petitioner's conviction (Appendix A) agreed with Petitioner's position that the evidence had to show that the marijuana distribution business from which the cash was derived had to take place within the United States or within a state of the United States. The Circuit Court also agreed that the facts had to show that Petitioner was sending money to Colombia in payment for marijuana previously obtained from de Andreis.

However, the inferences which the Circuit Court of Appeals for the Eleventh Circuit used to support its finding that Petitioner conspired with de Andreis to launder the proceeds of the marijuana enterprise taking place within the United States, constitutes a ruling so erratic as to have serious adverse effects.

Petitioner admitted that he owed a great deal of money to de Andreis in Colombia.

He also admitted that the cash he brought to CRV for transmittal to de Andreis in Colombia was from "marimba" or marijuana.

Petitioner further stated that he had 2,000 pounds of marijuana available for purchase in Miami and that this marijuana was from Colombia.

Both the District Court and the Circuit Court of Appeals then assumed from these facts that since Petitioner said that he had marijuana from Colombia available in Miami, and since Petitioner had \$200,000 from the sale of marijuana which he was sending to de Andreis, who was in Colombia:

1. The marijuana whose sale resulted in the \$200,000 was obtained from de Andreis and was sold in the United States.

2. The \$200,000 the Petitioner sent to de Andreis through CRV was for payment of marijuana that the Petitioner had previously obtained from de Andreis.

While these conclusions may be considered inferences from the facts, they are not reasonable inferences since one must assume the following facts before one may reach them:

1. That since Petitioner had marijuana from Colombia for sale and since Petitioner owed de Andreis a great deal of money, and since de Andreis was in Colombia, the marijuana which the Petitioner had for sale was obtained from de Andreis.

2. That since the \$200,000 plus dollars was from the sale of marijuana, and since Petitioner had marijuana for sale in Miami, the marijuana from which the \$200,000 was obtained was distributed within the United States or within a state of the United States.

The distribution of marijuana within the United States is obviously a critical law enforcement concern and the Travel Act is a powerful weapon for fighting the battle against the laundering of the cash proceeds of the marijuana distribution enterprises.

However, when a ruling such as that in the instant case is based upon facts that the record clearly reveals are non-existent, then that ruling becomes so erratic as to have serious adverse effects on the administration of justice.

The United States chose to proceed against the Petitioner under the Travel Act. When the facts, as clearly set forth by record, do not fit the statutory elements of that act, the conviction of one accused of conspiring to violate may not stand.

COUNT II

The decision of the Eleventh Circuit Court of Appeals resulting in the affirmance of your Petitioner's conviction (Appendix B) for attempting to distribute marijuana is in direct conflict with the Eighth Circuit Court of Appeals as set forth in United States v. Joyce, 693 F.2d 838 (8th Cir. 1982).

In United States v. Shapiro, the instant case, the Eleventh Circuit Court of Appeals held that the following facts were sufficient to constitute an attempt to distribute marijuana:

1. That your Petitioner delivered samples of marijuana to Government agents which contained prices thereon for different quantities and qualities of marijuana.

2. That said samples were delivered for the purpose of inducing a sale.

3. That your Petitioner repeatedly inquired about the prospective purchaser.

In United States v. Joyce, 693 F.2d 838 (8th Cir. 1982) the Eighth Circuit Court of Appeals found that the following facts were not sufficient to constitute an attempt to possess cocaine with the intent to distribute:

1. The Defendant, Joyce, arranged through a Government informant to purchase one pound of cocaine from an undercover DEA agent.

2. The Defendant flew to St. Louis with the money and met with the agent in a hotel room.

3. The Defendant and the agent agreed upon the price.

4. The Defendant refused to produce the money until the agent opened the package containing the cocaine for inspection.

5. The agent refused to open the package.

6. The Defendant refused to make the purchase and left the hotel.

7. The Defendant was arrested.

The Eighth Circuit held that Defendant had not engaged in conduct constituting a substantial step, even though he had agreed upon a price with the agent for a specific amount of cocaine and had flown to St. Louis to meet with the agent in the hotel room.

In your Petitioner's case, the negotiations had not even proceeded to the point the prospective buyer had agreed upon a price with your Petitioner.

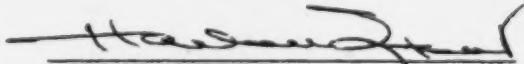
Thus, the decision of the Eighth Circuit Court of Appeals in the Joyce case is in direct conflict with the instant case as decided by the Eleventh Circuit Court of Appeals.

CONCLUSION

By its judgment, the Court of Appeals produced a ruling so erratic, as to Count I, as to have serious adverse effects. In addition thereto, the Court of Appeals ruling as to Count II is in direct conflict with the ruling of the Eighth Circuit Court of Appeals in United States v. Joyce, 693 F.2d 838 (8th Cir. 1982).

Petitioner respectfully urges that this Court grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment that Court entered against him.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5530
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BARRY SHAPIRO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 17, 1983)

Before HILL, KRAVITCH and HENDERSON, Circuit Judges

PER CURIAM:

Following a bench trial in the United States District Court for the Southern District of Florida, Bernard ("Barry") Shapiro was convicted of conspiring to violate 18 U.S.C. §1952 (the "Travel Act") and attempting to violate 18 U.S.C. §841(a) (distribution of a controlled substance). As his sole contention on appeal, Shapiro challenges the sufficiency of the evidence on each count. We find ample evidence in the record to support the convictions and, therefore, affirm the judgment of the district court.

In 1980, the Federal Bureau of Investigation (FBI) established an undercover investigation known as "Operation Bancoshares," which was designed to ferret out persons involved in laundering money from the sale and distribution of drugs. In Miami, Florida, the FBI formed CRV, Inc. This corporation accepted large amounts of cash from customers referred to it and (1) transmitted the money by wire to banks designated by the client; (2) furnished cashier's

checks in exchange for currency; or (3) issued checks on the CRV account. CRV assessed a two percent commission for the wire service and a one percent service charge for cashier's check exchanges. The income generated by the commissions and service charges eventually was deposited into the United States Treasury.

Undercover FBI agents operated CRV in an office located in a warehouse in Miami. Upon the delivery of cash, the agents counted the money and received instructions from the client concerning the transmission of the money. The CRV office was equipped with audio and video taping equipment enabling the agents to record each meeting.

Shapiro learned of CRV through Elias Facuseh. On July 20, 1981, Shapiro first visited CRV and, after indicating that he had previously dealt with Elias Facuseh, was told that CRV had taken over that business. On that occasion, Shapiro informed

the agents that he had an \$800,000.00 account with Jacoba de Andreis in Colombia, South America, and that he needed to satisfy the obligation. He indicated that "Jorge F." (Jorge Facuseh, Elias' brother) knew de Andreis. Shapiro did not conduct any business during this initial consultation.

Shapiro returned to CRV on July 23, 1981, carrying a shopping bag containing approximately \$50,000.00 in cash. When the agents asked him if it was "all marimba (marijuana) money," Shapiro nodded his head denoting a "yes" answer. Shapiro wrote down de Andreis' name and telephone number, but said that the agents would probably be talking to Jorge about the details in Colombia. He also stated that "if everything goes okay," by the end of the summer he expected to owe de Andreis \$4,000,000.00. Before Shapiro departed, the agents asked him whether he had any marijuana for sale. He answered that he had about 2,000 pounds of his own left over from a deal with some

Canadians that he would sell for \$210.00 per pound and that he would bring a sample during his next visit.

Shapiro again visited CRV on July 24, 1981. This time he brought approximately \$50,000.00 for delivery to de Andreis and three "zip-lock" plastic bags of marijuana, each labeled with a different price and quantity. He removed the plastic bags and described each sample to the agents. He told the agents that the marijuana came from Santa Marta, Colombia. The agents examined all three samples. After the agents advised they had a buyer for the marijuana, Shapiro related that he preferred to deliver it in several installments to the CRV office. Before leaving CRV that day, Shapiro asked how long it would take for the money wire to reach de Andreis and asked the agents to convey his regards to Elias.

On July 27, 1981, Shapiro brought another \$50,000.00 for de Andreis, in addition to \$12,234.00 for the purchase of a cashier's check to pay for an inspection of his airplane. He asked the agents about the buyer for his marijuana and was told that he was in Panama trying to raise the money.

On July 28, 1981, Shapiro made his last trip to CRV. He dropped off approximately \$45,000.00 to be transmitted to de Andreis and picked up his cashier's check.

Shapiro was indicted for conspiracy to violate the Travel Act and attempt to distribute over 1,000 pounds of marijuana. At the trial, the FBI agents testified about their meetings with Shapiro. The district judge also reviewed the video tape recordings of Shapiro's visits to CRV along with transcripts of the conversations. In addition, the agents testified that Elias Facuseh or his representative

picked up commissions from the Shapiro-CRV transactions and that Jorge Facuseh arranged for transmittal of the Shapiro money to de Andreis in Colombia, South America. Shapiro introduced no evidence in contradiction of the government's case.

The standard of review of the sufficiency of the evidence in a criminal case is whether a reasonable trier of fact could find that the evidence, viewed in the light most favorable to the government, establishes guilt beyond a reasonable doubt. United States v. Harper, 680 F.2d 731 (11th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982); United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982). The evidence need not exclude every reasonable hypothesis of innocence or be inconsistent with every conclusion except that of guilt. Id. All reasonable inferences suggested by the evidence that tend to support the verdict must be accepted by the appellate court. United States v. Kopituk, 690 F.2d 1289, 1323 (11th Cir. 1982).

Against this background, Shapiro contends that there was no evidence that he conspired with anyone and, additionally, that the government did not prove that the conspiracy involved the distribution of proceeds of an unlawful activity committed within the United States.

The Travel Act prohibits the "use (of) any facility in interstate or foreign commerce ... with intent to - (1) distribute the proceeds of any unlawful activity" 18 U.S.C. §1952(a)(1). "Unlawful activity" includes "any business enterprise involving... controlled substances ... in violation of the laws of ... the United States." 18 U.S.C. §1952(b)(1).

In order to sustain a conviction for conspiracy, the government must establish beyond a reasonable doubt that (1) a conspiracy existed; (2) the defendant knew of the conspiracy; and (3) the defendant voluntarily participated in the conspiracy. United States v. Lippner,

676 F.2d 456, 466 (11th Cir. 1982); Garcia, 672 F.2d at 1369. Proof of a Travel Act conspiracy under 18 U.S.C. §371 also requires evidence of an overt act committed by one of the conspirators in furtherance of the conspiracy. See United States v. Tombrello, 666 F.2d 485, 490 (11th Cir.), cert. denied, ___ U.S. ___, 102 S.Ct. 2279, 73 L.Ed.2d 1291 (1982); 18 U.S.C. §371. It is not necessary to present direct evidence of an agreement between the coconspirators - the agreement may be inferred from concert of action. Lippner, 676 F.2d at 466; Garcia, 672 F.2d at 1369; Kopituk, 690 F.2d at 1323; United States v. Malatesta, 590 F.2d 1379, 1381 (5th Cir.) (en banc), cert. denied, 440 U.S. 962, 99 S. Ct. 1508, 59 L.Ed.2d 777 (1979).^{1/} Finally,

^{1/} In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981.

participation in a conspiracy may be implied from a defendant's acts in furtherance of the purpose of the conspiracy. Kopituk, 690 F.2d at 1323.

The evidence adequately supports the conclusion that Shapiro participated in a conspiracy to use facilities of interstate or foreign commerce to distribute the proceeds of an unlawful activity. He admitted that the cash he brought to CRV for transmittal to de Andreis in Colombia was related to a marijuana transaction. He also indicated that the marijuana he possessed for the purpose of sale came from Colombia. He used CRV's services to transmit almost \$200,000.00 to Colombia. From these facts, a reasonable trier of fact could conclude beyond a reasonable doubt that Shapiro was sending money to Colombia in payment for marijuana previously obtained from de Andreis. An agreement between Shapiro and de Andreis to "launder" drug money can reasonably be inferred from this activity. The purpose of the conspiracy was to transmit money for the purchase of marijuana through underground

channels. Shapiro's act of employing CRV to wire large amounts of cash to de Andreis furthered that purpose.

The evidence also supports the finding that the money forwarded to de Andreis was the proceeds of an unlawful activity, in this case, a "business enterprise involving ... controlled substances... in violation of the laws of ... the United States." 18 U.S.C. §1952(b)(1). By Shapiro's own account these proceeds were derived from marijuana transactions. He also had 2,000 pounds of marijuana immediately available in Miami and furnished samples to the agents in Miami, Florida. These facts, coupled with the transfer of \$200,000.00 to Colombia, the source of his marijuana, clearly demonstrate that Shapiro and his coconspirators were engaged in a business activity involving controlled substances in the United States and satisfy the "unlawful activity" requirement of the Travel Act offense.

There was also sufficient evidence to sustain the conviction of attempting to distribute marijuana. In United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed. 2d 812 (1975), the former Fifth Circuit Court of Appeals established the elements of the crime of attempt to distribute controlled substances. The Mandujano court identified two elements of the offense:

(f)first, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting ... Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.

Id. at 376. There is extensive evidence that Shapiro attempted to distribute over 1,000 pounds of marijuana to the agents at CRV. In

his efforts to sell marijuana, he delivered samples and he repeatedly inquired about the prospective purchaser. Those actions manifested the culpability inherent in the distribution of a controlled substance, the attempt of which he was charged in the indictment. Shapiro's behavior also satisfies the "substantial step" prong of the Mandujano analysis. He brought samples of various types of marijuana to the agents for the purpose of inducing a sale. The samples contained slips of paper disclosing the price and quantity available. This demonstrated more than mere preparation to commit the distribution offense; it was strongly corroborative of his intent to complete the crime. Although Shapiro asserts that there could be no attempt because he never reached an agreement with the agents, we are not persuaded that an agreement is necessary. It is evident to us that he firmly intended to go through with the deal. On this basis, there

was sufficient evidence to find Shapiro guilty of the attempt to distribute a controlled substance beyond a reasonable doubt.

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.

APPENDIX B

CASE NO. 81-361-CR-EBD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

O R D E R

BERNARD SHAPIRO,

Defendant/

The Defendant, BERNARD SHAPIRO, was charged in a two count indictment on August 20, 1981.

Count I accused the defendant of conspiring with others to violate Title 18, United States Code, Sections 1952¹ and 22; all in violation of Title 18, United States Code, Section 371³.

Count II alleged that the defendant attempted to distribute more than 1,000 pounds of marijuana in violation of Title 21, United States Code, Sections 841 (6)(1) and 846.

¹ Interstate and foreign travel or transportation in aid of racketeering enterprise

² Principal

³ Conspiracy

A bench trial was conducted on January 12 and 13, 1982. After the government rested its case, defendant submitted no evidence or testimony.

Facts

From some time prior to June of 1981 until August 4, 1981, the Federal Bureau of Investigation conducted an undercover business under the name of "C.R.V. Associates" (C.R.V.) as a part of its investigation, known as "Operation Bancshares", of the laundering of drug money in Southern Florida. The offices of C.R.V., located in Miami, were equipped with devices to record the transactions and activities at C.R.V.

C.R.V., which took customers by referral only, offered its customers numerous services for the conversion of customer's cash into other financial instruments and transactions. One such service, employed by this defendant, consisted of the customer bringing cash to

C.R.V. and C.R.V. having the money wire transferred to a bank account, per the instruction of the customer's associates, for transmittal to Columbia, South America.

In the case at bar, C.R.V. charged a 2% commission for its services. C.R.V. kept a part of this commission, equalling 3/4% as earnings which ultimately accrued to the United States. C.R.V. had the balance of this commission, equalling 1 1/4%, forwarded to one Elias Facuseh. Of this 1 1/4%, 3/4% was owed to Elias Facuseh for referring the customer. The remaining 1/2% portion was owed to Jorge Facuseh, the brother of Elias, for disbursing the money to the ultimate receipient in Columbia, South America.

On July 20, 1981, defendant Shapiro telephoned C.R.V. and spoke with Special Agent Antonio Franco, who was using the undercover name of Tony Fernandez. The defendant introduced himself as Barry, a friend of

Jorge "F". The defendant stated that Jorge Facuseh suggested that the defendant set up an appointment with C.R.V.; which he did.

Thereafter, on July 20, 1981, the defendant came to the premises of C.R.V. Defendant inquired about "Elias" and revealed that he had been working with Elias Facuseh to settle an account with an outstanding balance. Defendant stated further that he was receiving money from several Canadians, and that he would have about \$100,000.00 the following day. In responding to a query as to whom would the money go to in Columbia, defendant indicated, "Jacobo de Andries . . . they know him down there . . . They done it before". Defendant went on to reveal that he is a pilot who occasionally takes charters. When asked by an undercover agent if he flew "Marimba"⁴ in from Santa Marta, the defendant answered, "I used to. I'm retired", and stated

⁴Testimony of the agents revealed that "Marimba" is a commonly used Spanish term for marijuana. Defendant Shapiro apprised the agents that he spoke Spanish, and conversed in both Spanish and English on the tapes.

that he continued to do "other things" such as "fly people . . . money. Translation. Surveillance". The defendant, after informing the agents that he would call "as soon as these Canadians get here and bring me . . . all the paper", departed.

On Thursday, July 23, 1981, the defendant again telephoned and arranged to come to C.R.V. The defendant arrived carrying a shopping bag, supposedly containing \$50,000.00. However, upon counting the money in the defendant's presence, the agents determined that it contained only \$49,800.00. The defendant took \$200.00 from his person to make up the shortage. Defendant Shapiro instructed the agents to send the money to Jacobo de Andreis. The defendant said that Jorge Facuseh knew Jacobo de Andreis, and that the agents probably would talk to Jorge Facuseh. Defendant Shapiro added that he had a \$800,000.00 balance with Jacobo de Andreis and that if everything went well, defendant would owe Jacobo de Andreis an extra \$4,000,000.00 by the end of the summer.

Agent Franco then asked the defendant whether this money was for "Marimba". The defendant nodded his head. Agent Franco inquired further as to whether any was for cocaine. The defendant shook his head. Agent Franco next asked the defendant if he had any "Marimba" to sell in this area. Defendant Shapiro answered that he had 2,000 pounds of "good stuff" for sale at \$210.00 per pound, which he could deliver immediately to C.R.V. The Defendant explained that the 2,000 was available because the Canadians had not purchased it. The defendant declared that the marijuana was "not brokerage deal ... (I)t's mine".

Before leaving, defendant asked the agents if they would care for a sample, to which the agents responded affirmatively. Defendant said he would return the next day with the sample as well as with the same amount of money. Defendant also mentioned that the

marijuana was from the other side of Santa Marta, and that since he was so pleased with it, he planned to "do more business with these people . . . another \$50,000.00".

The next day, defendant did indeed return with three small plastic bags containing 208.4 grams of marijuana. The first bag, according to defendant was his merchandise; was the best, and was available for \$210.00 per pound, with about 2,000 pounds ready for sale. The second bag, which was his partner's, was for \$180.00 per pound, with about 2,500 pounds available. The third bag, which was a friend's, was available for \$170.00 per pound, with nearly 10,000 pounds ready for sale. Defendant requested that the agents promptly reply to his offer, and indicated that he would deliver the marijuana in installments.

Defendant also brought along \$50,000.00 in cash to be sent to Jacobo de Andreis. Upon leaving, defendant Shapiro asked if the agents would send his regards to Elias Facuseh.

The defendant returned to C.R.V. on Monday, July 27, 1981, and brought another \$50,000.00 cash to be wired to Jacobo de Andreis. The agents at C.R.V. were apprised by defendant that the money he had delivered to C.R.V. on Thursday, July 23, 1981 had been received in Columbia on Friday, July 24, 1981. Moreover, the defendant requested that the agents provide him with a cashier's check for \$12,234.00 payable to "Airesearch", to pay for the inspection of an airplane. The agents received cash for the check amount and a 1% commission. Defendant queried the agents as to the marijuana samples, to which they responded that their buyer was in Panama.

The final cash transmittal request of the agents by defendant occurred on Tuesday, July 28, 1981 at the offices of C.R.V. The cash transmittal was supposed to be for \$45,000, but defendant had only \$44,510 promising to have the shortage transmitted at the next transaction. Again, the

money was for Jacobo de Andreis. Unlike before, the defendant registered a complaint with the agents that he had received a complaint that Friday's money had not yet been received. He then asked if the agents would check into this with Elias Facuseh. A short time later, defendant's cashier check arrived. In departing company with the agents, defendant informed them that although he would be out of town for awhile, he would call them about the buyer when he returned.

It is clear from the testimony taken at the trial that the agents did indeed transmit the money received from defendant Shapiro minus the 2% commission to their account at Southeast First National Bank of Miami, and then to an account of Jorge Facuseh at Continental National Bank of Miami. This result occurred consistently after the agents had conversed with Elias Facuseh. On a whole, \$190,620.00 had been provided by defendant to the agents for transmittal to Jorge Facuseh in Columbia.

The commission money owed to Elias and Jorge Facuseh was picked up either by representatives of Elias Facuseh or Elias Facuseh himself on July 23, 26 and 29, 1981.

COUNT I

Count I alleges that on or about July 20, 1981 and up to and including August 4, 1981, the defendant and unnamed individuals conspired to commit an offense against the United States, namely: to violate Title 18, U.S.C. §1952 and 2.

To be found guilty of this offense, the following elements⁵ must be provided:

- 1) That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;
- 2) That the defendant willfully became a member of such conspiracy;

⁵ According to Pattern Jury Instructions for the Fifth Circuit Criminal Cases, Offense Instruction Number 3. (Conspiracy)

3) That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods (or "overt acts") described in the indictment; and

4) That such "overt act" was knowingly committed at or about the time alleged in an effort to effect or accomplish some object or purpose of the conspiracy.

As to element number 1, the Court finds that Barry Shapiro came to a mutual understanding with other persons, including but not necessarily limited to Elias Facuseh, Jorge Facuseh and Jacobo de Andreis, to try to accomplish the common and unlawful plan of using and causing to be used facilities in interstate and foreign commerce with intent to distribute the proceeds of a business enterprise involving the distribution of marijuana, in violation of Title 21, United States Code, and with the further intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of that business enterprise.

As to element number 2, the Court finds that the defendant, Shapiro, willfully became a member of the conspiracy.

As to element number 2, the Court finds that during the existence of the conspiracy, the defendant, Shapiro, one of the conspirators, knowingly committed the following overt acts, described in the indictment:

a. On or about July 20, 1981, in Miami, in the Southern District of Florida, the defendant met with undercover agents of the FBI.

b. On or about July 23, 1981, in Miami, in the Southern District of Florida, the defendant delivered to undercover agents of the FBI approximately \$50,000.00 in cash.

c. On or about July 24, 1981, in Miami, in the Southern District of Florida, the defendant delivered to undercover agents of the FBI approximately \$50,000 in cash.

d. On or about July 27, 1981, in Miami, in the Southern District of Florida, the defendant delivered to undercover agents of the FBI approximately \$50,000.00 in cash.

e. On or about July 28, 1981, in Miami, in the Southern District of Florida, the defendant delivered to undercover agents of the FBI approximately \$44,510.00 in cash.

As to element number 4, the Court finds that each overt act described above was committed at or about the time alleged in an effort to effect or accomplish some object or purpose of the conspiracy, to wit: to distribute the proceeds of a business enterprise involving the distribution of marijuana, and to facilitate the carrying on of that business enterprise.

COUNT II

Count II alleges that between July 23, 1981 and July 28, 1981, defendant Shapiro attempted to distribute more than 1,000 pounds of marijuana.

The elements of this offense, which must be proved, are:

- 1) That the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime he is charged with attempting. That is, the defendant

possessed the required intent to unlawfully distribute in excess of \$1,000.00 pounds of marijuana. United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974)

2) That the defendant engaged in conduct which constitutes a substantial step toward commission of the crime. That is, the acts were unique rather than so commonplace that they are engaged in by persons not in violations of the law. Mandujano, supra; United States v. Rivero, 532 F.2d 450 (5th Cir. 1976).

As to element number 1, the Court finds that defendant, Shapiro, under the circumstances of this case, purposefully and intentionally performed acts which constituted a firm offer to achieve the goal of unlawfully distributing marijuana.

As to element number 2, this Court finds that defendant, Shapiro, advised the agents that he would sell to them the marijuana he had available; that defendant expressed a preference to deliver the marijuana in installments, at the

door of C.R.V.: and that defendant provided samples of the various qualities of marijuana available for sale by him, thereby clearly manifesting a present ability to meet the terms of his offer upon immediate acceptance. This kind of conduct is definitely a substantial step towards unlawfully distributing marijuana; and is unique and not commonly engaged in by persons not in violation of the law.

Based upon the aforementioned application of the law on the facts as found by this Court, it is hereby

ORDERED AND ADJUDGED that the defendant is GUILTY as charged on both Counts of the indictment.

DONE AND ORDERED this 27th day of JANUARY, 1982.

/s/ Edward B. Davis
UNITED STATES DISTRICT COURT JUDGE

Copies Furnished to:

Carolyn Heck Esq.

William Isenberg Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-361-CR-EBD

UNITED STATES OF AMERICA

vs.

O R D E R

BERNARD SHAPIRO

Upon consideration of the Defendant's Motion
for New Trial and Motion for Arrest of Judgment,
it is

ORDERED AND ADJUDGED that the Motions are
DENIED.

DONE and ORDERED at Miami, Dade County,
Florida, this 11th day of February, 1982.

/s/ Edward B. Davis

UNITED STATES DISTRICT JUDGE

Copies furnished to:

William S. Isenberg, Esq.
Caroline Heck, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 81-361-CR-EBD

UNITED STATES OF AMERICA vs.

BERNARD SHAPIRO

DEFENDANT

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the
government the defendant appeared in person

on this date April 27, 1982

() WITHOUT COUNSEL However the court advised
defendant of right to counsel and asked whether
defendant desired to have counsel appointed by
the court and the defendant thereupon waived
assistance of counsel.

(XX) WITH COUNSEL William S. Isenberg Esq.
(Name of counsel)
315 S.E. 7th St. Ft. Laud.

PLEA

(XX) GUILTY, and the court being satisfied that
there is factual basis for the plea,
() NOLO CONTENDERE, () NOT GUILTY

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of Conspiracy, and Attempted distrib of Marijuana in violation of Title 18 U.S.C. Section 371 and Title 21 U.S.C. Section 841(a)(1) & 846

SENTENCE OR PROBATION ORDERSPECIAL CONDITIONS OF PROBATION

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the con was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS, as to Count 1, or until otherwise discharged by due process of law, it being further

ORDERED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment

for a period of THREE (3) YEARS, as to Count 2, or until otherwise discharged by due process of law, it being further

ORDERED that the sentence imposed hereinabove as to Count 2, shall run Concurrnetly with the sentence imposed in Count 1. It being further

ORDERED that execution of sentence of confinement shall be deferred until May 12, 1982 at 2:00 p.m. at which time the defendant shall surrender himself to the Institution designated by the Bureau of Prisons at his own expense.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of
the Attorney General and recommends

It is ordered that the Clerk de
a certified copy of this judgm
and commitment to the U.S.
shal or other qualified officer

SIGNED BY

(XX) U.S. District Judge

() U.S. Magistrate

/s/ Edward B. Davis

Date 4-27-82

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5530

UNITED STATES OF AMERICA,
 Plaintiff-Appellee,
 versus
BARRY SHAPIRO,
 Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(April 27, 1983)

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge